goods out of Washington on the Union Pacific Railroad, because it does not run to Washington. The Baltimore & Ohio Railroad Company draws upon Washington for its business in part, and the Union Pacific Company only secures business from Washington indirectly as connecting carriers bring goods to it. The case of fire insurance is entirely different. Invariably policies of insurance upon identical property are taken in a number of companies. It is an almost unheard of matter for anyone to insure his property in only one company. Certainly, the mercantile and manufacturing risks of the country are almost without exception insured in a large number of companies. These insurance companies which insure the same identical property do not write at different rates, but all are forced by law to a common rate; and if there were no law prescribing a common rate, (a common rate is prescribed in Missouri) each company doing business, in fixing a rate for the future upon any given property, would necessarily have a resort to the experience of all the companies in that territory, to ascertain what was a reasonable rate at which it, the proposed insurer, would write the business.

The Court must bear in mind that the rates here under attack are rates for the future. Rates for the future can rest only upon past experience. It cannot be presumed that if a particular parcel of property has existed for 100 years without burning, that this in any way proves that that parcel will not burn in the future. The probability that that particular parcel will burn must be measured by its qualities, as structure, exposure, protection, etc., and resort to experience of like properties and like situations considered in large numbers to eliminate chance. For the same reasons that no experience can be had upon one piece of property on which to base rates, there can be no presumption that the experience of any one company will be the experience of that company in the future. The customers that company has this week will next week be the customers of other insurance companies.

They all write at the same rates of premium, and customers are persuaded to change from one insurance company to the other by their social relations to the agents, and this reason and that reason, which cause a constant interchange of customers. The only unit of territory which it is possible to use in arriving at proper rates in a state is that of the state. It is not necessary to weigh the difficulties incident to employing a smaller territorial unit, because none is in contemplation in this case. To use a larger unit would be unsound, because the physical conditions which exist in one state are not peculiar to another. Whereas, the predominance of property in Kansas may be wheat, in Alabama the preponderance may be cotton, and in Oregon it may be lumber. So there are other differences, as for example in the aridity. Therefore, the territorial unit for sound use in measuring insurance experience is the state. The experience must comprehend sufficient risks, and the experience of them, to form reasonable distribution. The experience of all the companies in a state over a period of five years is a minimum standard. Most insurance authorities adhere to the view that ten years is a better period than five years. Less may not be considered to reach averages of any value. The fixing of rates for the future upon the experience of the past is upon the assumption that the future will reproduce the experience of the past. If this may not be anticipated, then the past experience is of no value in making estimations for the future.

The business of insurance is a highly complex business. In the making of equitable rates, is involved scientific estimation of probability, including laboratory tests and experiments, determination of fire resistive qualities of various objects, the determination of elements of structure, exposure, protection, combustibility and damageability.

Another problem of equal importance is the distribution of charges equitably between different communities in the

state and different states in the Union. A proper perspective of the business contemplates an equitable distribution of the insurance charge as between the states, having in consideration the difference in the structures and the insurable property in the various states, and their qualities; as cotton in one and grain in another; the difference in climatic conditions; as aridity in one and heavy rainfall or snowfall in another. The balance of all these elements, one against the other, is what permits equitable charges. If not equitable, it means that the merchant or manufacturer in one state has a tremendous advantage over the merchant or manufacturer in another state, because the burden of his insurance is lower. It may be that the competition of the merchant or manufacturer is with a person in a remote state. If a common insurance standard exists in both states, then the producers in each state are upon an equality as nearly as it is possible to make them equal. That standard is created in Missouri by this statute. If a standard is adopted which, upon the *average* will permit every contract of insurance in a state to be written with a fair amount of profit thereon, the effect of this is to permit companies, the character of whose business and managerial skill and good fortune are above the average, to make more than a reasonable profit. Those of average skill and having an average volume of business and average experience will make a reasonable profit only. Those which are badly damaged or whose volume is not sufficient to enable them to distribute their expense sufficiently wide, or who happen by sheer misfortune to have more than their share of unfortunate losses, will make less than a reasonable profit or perhaps sustain huge losses. This is the purpose of the statute, to find a level, *not at which all* companies can make a profit, but upon which they will, *upon the average*, make a reasonable profit and a reasonable profit only. If, upon the average, they make a fair profit, those above the average will make more than that profit and those below the middle level will lose money.

The presumption must be drawn in insurance that the experience of each company for the future, (and it is for insurance of the future the rates are to compensate), will be a duplication for the future ratably of the experience in the past of all companies in the same territory. When a railroad repeatedly receives shipments from a manufacturer on its line, it may reasonably assume that it will probably receive shipments in the future. When an insurance company receives a premium upon a risk and the property burns, it knows it will receive nothing from that risk in the future whatever. A particular risk which has proved profitable in the past over a long period may be highly unprofitable in the future. We know if it burns it will be. So, also, a company which may have made huge sums in the past may lose huge sums in the future. A small company, by the happening of one serious fire in St. Louis, might show a most disastrous experience, but it should not on this account alone have an increase of rates (even though it were a perfectly managed company), for such disasters are expected in the business even with the best of management. Such company should not have an increase of rates because *its* experience in the territory proved unfortunate, but should still be required to charge only that premium in the future which the experience of all the companies disclose is reasonable. If the experience of each company in the past were to be made its criterion for the future, the company which had an unfortunate happening in the past would be put to the necessity of increasing its rates, and in increasing the rate in competition with its competitor would lose its business, whereupon it would necessarily lose still more.

The presumption must necessarily be adopted, because it is the only sound one in insurance, that the experience of each company in the future, that is, the ratio of its losses (operating outgo) to its premium income (operating income) will be a replica of the relation of losses to premium income

each asserts that the constitutional rights of itself are infringed. The order of the superintendent herein operates to compel each company doing business in Missouri upon the average to do so at a loss and at less than the cost of operation.

The Court is in error in its assumption that the statute has in contemplation, or that the petitioners claim, or that they proceed upon the theory that there must be "a reasonable profit *for all*." A given rate level being fixed which will limit the aggregate profits of all companies to a specified sum will not by any possibility give compensation, as the Court assumes, "to all companies that happen to be engaged in the affected business." If the aggregate profits of all companies be limited to a reasonable sum upon the whole business, this is an aggregation of (*a*) huge profits to some; (*b*) moderate profits to others; (*c*) moderate losses to still others; and (*d*) huge losses to still others. It is the conglomeration of these four which is productive of a limitation of profits to an aggregate reasonable sum.

It is alleged in the petition herein, that the losses and expenses of the five-year test period of all companies were 109.3 per cent of the income (Tr. 22). (The proof shows it still greater.) It is contended by the petitioners that this gives rise to the presumption that the average experience for the future of *each* of the petitioners would be in the same ratio for the future if no reduction order were made. If a reduction order be made it naturally increases this loss to the extent of the reduction.

The petition (original pleading) alleges that the order is unreasonable and unjust, and that the "effect thereof is to reduce the rates of premium to be charged and collected *by plaintiffs, and each of them*, upon all policies of fire, lightning, hail and windstorm issued by them *respectively*, covering property in the State of Missouri, to a point *below* what

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is reasonable and adequate to the various risks covered by such policies" (Tr. 31); that if the reduction order be permitted to remain in effect, it will compel doing business at rates which "would be *unreasonably low* and *not commensurate with the risks* to be assumed by plaintiffs under policies of insurance to be issued by them; and would *compel plaintiffs to do business* in Missouri *without receiving* a reasonable profit or *any profit* thereon *but at an actual loss;* and the rates fixed by said order would be *confiscatory* and that the enforcement of said order would result in *irreparable damage and injury to plaintiffs and each of them* * * * ; and plaintiffs further allege that if said order were enforced * * * plaintiffs and *each of them would be deprived of their property without just compensation and without due process of law,* contrary to the provisions of * * * Section 1 of the Fourteenth Amendment of the Constitution of the United States, which provides that "no state * * * shall * * * deprive any person of life, liberty or property without due process of law." (Tr. 32.)

The theory of this complaint and the theory of this case, as here presented, and the theory of the statute is, that the experience of all companies which were in the state, during a five-year test period, will presumably be the experience of each company which shall do business in the state in the future, and the effect of the rate order is to deprive the petitioners, and *each* of them, of its property without due process of law.

This Court has been led into error because a conglomerate or combined experience was employed as a measure (see petition, Tr. 22), and having in mind the proof which is put into the evidence in railroad and utility cases (namely, the experience of the particular utility complaining), the Court has assumed that the conglomerate experience here introduced was the experience of all of the petitioners. The Court assumes that such proof was designed to prove that *all* of the

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petitioners, as a combined matter, had lost money and, therefore, complaint could be made by *them*, because as a combined matter *they* would lose in the future, although some of them would make money and some would lose. Nothing could be further from the intent of the pleader or the intent of the statute or from the intent of the Courts of Missouri, which have passed upon this problem. To the contrary, the position is that the companies which do business in the state all having a common rate-making agency, and no one company having any experience by which to judge the future, that the experience of all of the companies who did business during five years before furnish a cross-section reasonably indicative of the future experience of each company proposing to do like business. This is in fact elementary in insurance and it could not reasonably be otherwise. The same identical plan would be employed if there were no statute governing the subject.

We wish to disabuse the Court of the view which it evidently has, that the combined experience produced is the experience of *the petitioners*. Such is neither the proof in this case, nor the intent of the statute. The companies who were in the state during the five-year test period are not identical with petitioners. Many companies quit Missouri during the period in question and some new ones entered. The plaintiffs are all members of the Missouri Inspection Bureau, which is a rate-making organization, of which each of them is a member and no company or group of companies in it has the power to exclude or keep the others out of the organization. The Bureau is provided for by statute and all companies are members and are compelled to belong to it and are bound to contribute to its support. (Mo. R. S. Sec. 6272.) The Missouri Inspection Bureau keeps rating records which are open to the public and in which appear the rates of premium applicable to every risk in the state. These are uniform as to all companies in the state and rates may be ascer-

tained from them in advance by any person wishing insurance and the detail of the method in which the rate is prescribed and arrived at must be the subject of public record and inspection. They must be in such form that not only can the property owner ascertain what the rate is but also "the make-up of such rate" (Mo. R. S. Sec. 6270). So scientific are these records of rates that it is possible therefrom to determine whether discrimination exists; namely, whether one property owner is charged more for his insurance than another, even as to dissimilar types of property, and no rate can be fixed on any property in the state which discriminates unfairly between that risk and other risks in the state. (Mo. R. S. Sec. 6276.)

The statute, which gives power to the superintendent to investigate the reasonableness of rates of insurance companies (in which we insert the words in parenthesis of our own selection to make clear the intent of the statute) reads (Mo. R. S. Sec. 6282):

> "The superintendent * * * is hereby empowered to investigate the necessity for reduction of rates, and if, upon such investigation, it appears that the results of the earnings in this state of the stock fire insurance companies (*meaning all of them*), for five years next preceding such investigation, shows there has been an aggregate profit therein (*from the experience of the companies which happened to be in the state during that period*) in excess of what is reasonable, (*allowing a reasonable profit upon each policy upon the average*), he shall order such reduction of rates (*upon each policy of insurance of each several company in this state upon the average*) as shall be necessary to limit the aggregate collections by insurance companies in this state (*namely, the aggregate from the summing up of each and all of such authorized individual rates*) to not more than a reasonable profit (*upon each individual policy of each particular insurer as an average, as demonstrated by such aggregate.*)
>
> (Words in parenthesis inserted by us.)

The effect of the rate order is individual upon individual companies, as is indicated by the language of Section 6284, reading:

> "During the pendency of such action or review *each* insurance company or other insurer shall not charge any rate or premium in excess of that fixed by the superintendent of insurance."

We call attention of the Court to the fact that the experience of each company doing business in Missouri during the five-year period in question was proven year by year as to each company, both upon the written and upon the earned basis. (Tr. 1934, 1938.)

The Court will find, by examination of these figures, that a very few companies made money and most companies lost money. If the rate reduction order stands, the companies now in the state will have a loss upon the average *and* in the aggregate of ten per cent greater than the companies had which were in the state during the five-year period in question. This does not mean, however, that all companies will lose money during the future, nor does it in any way indicate that the companies which lost the largest sum in that period will be the largest losers in the future; or those having the greatest profit will, in the future, have the greatest profit. In fact, we think it is of importance for the Court to understand that the five-year experience proven is *not* the experience of these petitioners. Each year during the five-year period, companies entered the state and companies left the state and ceased doing business there. If not a single one of the plaintiffs had been doing business in the State of Missouri during any part of the five-year period provided for a test, to maintain a suit on the ground of confiscation of its property by the rate order, it would still be necessary for any particular company, in order to establish confiscation, to prove the experience upon the *average of all* the companies which did business in the state during the five-year test

period. This would be so if there were no statute in Missouri (except only that in the absence of a statute the company would select a ten-year period instead of a five-year period as a test period of choice). If no one of the plaintiffs had been entered in the State of Missouri during any part of the five-year test period, this suit would have been brought exactly as it was. As the matter stands, there were some companies who were in the state at the beginning of the five-year test period but failed to survive it. There were some who were present in the state throughout the whole period. There were still others who entered the state after the test period commenced. The companies which make up the group which is used as a test have no necessary relation to the plaintiffs herein, except that they were engaged in business in this identical territory for a period of years and, therefore, furnish a fair test of the relation of outgo to income on the rate level then existing.

The Court might inquire:

If no one company has a sufficient experience during five or ten-year period to enable it to determine that rates are just or unjust, why could not such a company adopt a longer period of time?

The reason this cannot be done is because physical conditions change so greatly over a longer period of time. To go back more than ten years takes us back to the time when garages were not nearly so common as now in the residential districts. Automobiles were not so prevalent. Concrete structures were more uncommon. In fact, civilization changes so that a ten-year period represents about the maximum which can be said to fairly gauge the future and five years represents a minimum period from which averages may be deduced. These represent approximately the limits which may reasonably be adopted as to time. As respects the territory, the state forms a unit so natural that nothing else

can be seriously considered. So far as the number of risks are concerned, to take the insurance obtaining in one block or one village or the risks existing on the books of one company may all be readily rejected as not presenting any situation which may be anticipated will fairly be reproduced in the future. The amount at risk on the part of insurance companies is 100 times more or less the premium. A company, therefore, which had a premium income in Missouri of $10,000, would have a possible liability of $1,000,000. It would be very easy in *one fire* for that company to have a loss greatly more than its entire premium income in the state. The fact that it had a loss experience, even with the most careful underwriting, of say 200 per cent during a given period would not indicate in any way that that company could anticipate that experience in the future. It certainly could not anticipate that the same structures which burned in its past experience would burn again in the future, because they would be destroyed and non-existent and productive of no premium. It could not be presumed that this company wrote other properties of the same kind, because it might or might not do so. The property which this company insured and which burned might be a grain elevator and that company might not insure another grain elevator in the state. *Its* experience in the past, therefore, might not be possible of duplication of the future as to the hazards involved.

Insurance differs essentially from every other business. In the case of a railroad, it serves a given territory and has given facilities; and in the case of a utility, it ordinarily has the field to itself and commonly has customers which, having secured, it retains. In the case of railroads or utilities, the cost of the transportation or the cost of the gas or of the electricity is reasonably fixed and profit may be controlled by regulation of the income; the outgo is practically fixed and reaches its maximum or minimum by a maximum or minimum of good management. In the case of insurance companies,

however, there are hazards arising which are entirely beyond the control of the insurance company and these may prove very severe in a given case, so that the outgo is not within control of the executives as is the case with utilities and railroads. The fact that a given outgo has existed in the case of a particular insurance company in the past is not probative that its outgo will be that in the future. Outgo is only in a small measure controllable. Disastrous losses may come to the best managed company and it is therefore not in contemplation that each contract of insurance shall have its individual modicum of profit, as in the case of utilities and railroads, for in the case of insurance it is known in advance that some policies will have losses a hundred times the premiums. It is in contemplation that this shall be so. Insurance companies are all engaged in the same territory, competing for the same customers at uniform rates, and in many cases insuring upon identical property with other insurance companies.

We call attention to the fact in this case that when the superintendent made an order reducing rates he did not send notice to each of the insurance companies here in question but sent it to the rating bureau, through which each of them acted and which made the rates for each of them. (Tr. 23.) In so doing, he recognized their solidarity and that practically they are not competitors, so far as rate questions are concerned.

The consideration of the business of insurance in contradistinction to other business was before this Court in the case of *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389. This Court has recently reviewed that case in its consideration of the case of *Tyson & Bros. United Theatre Ticket Offices, Inc.* v. *Joab H. Banton, as District Attorney, etc.*, 273 U. S. 418. In that case the Court says that the regulation of the business of insurance by the states is lawfully defensible, and states that the difference between in-

surance and other business which justified the attachment of the police power to the business is

> "that in an insurance business each risk was not individual, 'that there can be standards and qualifications of risks determined by the law of averages' and while there might be variations, that rates are fixed and accommodated to such standards."

One of such standards, dependent entirely upon the law of averages, is that the justice of a rate level proposed to be applied to the future is to ascertain what that rate level has produced during an elapsed five years statewide when applied by all companies doing business in the state upon all of their business of fire insurance and allied lines of insurance. A standard is set up reasonably that if a certain percentage or proportion of the income remains after providing for outgo during the test period, that such level applied in the future will produce a profit in that same ratio or percentage to every company doing business in the state in the future. The term provided is five years. If, after the rate so applied has been tested out for a year, it proves to be unsound, then the test period previously employed is superseded by a new one, in which the first year of the former test period is dropped and the newly elapsed year is added; whereupon a new five-year period exists by which the rate can annually be tested to find its adequacy.

If there are no great upheavals, such as war and other like conditions, the great probabilities are that the newly adopted standard upon elapsing of a single year will show an experience practically the same as the one it supersedes, and the variations will be so slight as not to warrant interference.

One peculiarity of the business of insurance, as the Court noted in the *Tyson case* reviewing the *German Alliance case*, is that

> "the contracts of insurance may be said to be interdependent. They cannot be regarded singly or isolatedly,

and the effect of their relations is to create a fund of assurance and credit, the companies becoming the depositories of the money of the assured, possessing great power thereby and charged with great responsibility."

It is true that the contracts of insurance are interdependent, and the relations which are established by the rating bureau acting for each of the companies and for all of them, makes every contract so related to every other contract of insurance in the state that one contract of insurance can not be raised or lowered without changing the relation between it and the charges for insurance upon other property in the state. As the matter now stands, the owner of a specified property pays exactly the same premium as the owner of an identical property located in another city, which is identical in its fire protection, provided that the two properties are alike in their structure, their protection, their contents and their exposure. This is true, regardless of the insurance company with whom the insurance is had or the agency through which it is secured. If differences in the fire hazard exist in the two properties a difference in rate also exists measuring the difference in hazard. That situation could not possibly exist if different companies had different rates, and the fact of the likeness in this particular creates relations between different parcels of property which cannot be destroyed without destroying the whole theory upon which insurance rests.

This Court in the *Tyson case* says of the *German Alliance case*:

> "The decision proceeds upon the ground that the insurance business is to be distinguished from the ordinary private business; that an insurance company is in fact an instrumentality which gathers funds upon the basis of equality of risks from a great number of persons—*sufficiently large in number to cause the element of chance to step out and the law of averages to step in* as the controlling factor, and holds the enormous amount so collected as a general fund to be paid out to those who shall suffer losses." (Italics are ours.)

Insurance is distinguishable from ordinary private business and is distinguishable from any other kind of business. The premiums are in fact gathered upon the basis of equality of risk, and that equality of risk is determined scientifically. The equality is relatively established as to all insured property in the state and exists whether insurance companies would wish to charge more or less than a specified amount warranted by the risk. If they charge more, they charge more than the risk is worth; if they charge less, they charge less than its value. To determine whether they are charging too much or too little or the right amount upon these several risks upon which the several companies write by their several policies of insurance, consideration must be given to risks "sufficiently large in number to cause the element of chance to step out and the law of average to step in as the controlling factor." This language expresses our complete point.

The statute creates a measure by which to eliminate chance, and substitute the law of average to determine the adequacy of charge on the individual policies by several companies throughout the state for insurance upon Missouri property. If that standard is one that is sound, no one can complain. If the standard is unsound, complaint may be had. Neither the plaintiff nor the defendant complains herein because the experience of all the companies which were in the state during the five-year test period are considered, because nothing else would cause the element of chance to step out and the law of average to step in. Neither the plaintiff nor the defendant complains of the written statute, which requires this experience to be taken as respects income and outgo of the entire insurance industry in the state for a specified period of years and the profit or loss balance remaining expressive of average experience taken as a measure or standard. In a sense, it is arbitrary, as is any measure.

So is the linear measurement, styled an "inch," an arbitrarily adopted measure. If we speak of a foot, however, we mean twelve inches. If the Court appreciates that the Missouri statute is not any innovation, but is a mere declaration of what is universally credited in the insurance business, namely, that the experience of all companies statewide for five to ten years in a state is the best possible measure of what the future will produce in the way of profit or loss upon the average to each company doing business in the state thereafter while such rate level remains, then the Court will have grasped our point.

IV.

It only remains to correct impressions which the Court evidently has, which we regard as clearly erroneous.

(1) The Court evidently regards the Missouri statute, which provides for determination of past experience by consideration of aggregate profit of all insurance companies in the state, to mean that this is a measure only of aggregate profit for the future and fails to note that it is the standard for determination of the charge productive of an average profit to each company for the future.

The Court states that the reduced rates "are applicable to the business of all companies alike and without regard to the past or prospective profits or losses of any of them." This statement would more justly be paraphrased to read that the reduced rates are applicable to the business of each company alike without regard to the past profit or loss of any particular company and without regard to whether such company was or was not within the state during the test period, but considering the profit or loss sustained in a past period upon the average of all the business in the state as measuring the prospective profit ratably of each company for the future.

The Court says that it is not claimed on behalf of any one company that the reduced rates "would be too low to permit *the* company to make a reasonable profit or to have just compensation for *its* contracts of insurance." To the contrary, that is exactly what the plaintiffs and each of them do claim; and they and *each* of them claim that they are allowed no compensation whatever for taking the risk of insurance but are compelled to do business for the future without any profit whatever.

The Court say that the Fourteenth Amendment "does not protect against competition." In a just sense there is no competition between insurance companies which are all compelled to do business at a common rate. They are competitors in a sense that each strives for business against other companies but they are not able to offer any different or lower rates as a condition of competition, and being bound to uniformity of rate and each being bound to resort to the average experience of all companies to prognosticate its own future, they are by necessity compelled to charge a common rate for the future. Their situation is an enlarged application of the principle adopted by this Court in *St. Louis & San Francisco Ry. Co. v. Gill*, 156 U. S. 649, wherein the Court held that the correct test was

> "The effect of the act on defendant's entire line and not upon that part which was formerly a part of one of the consolidating roads."

The Court say that "aggregate collections sufficient to yield a reasonable profit for all do not necessarily give to each just compensation for the contracts of insurance written by it." The peculiarity of the business is such that no one company can say that any sum is just compensation to it except by resorting to the average experience of the business as conducted in the past by all companies in the same territory. There would be no reason why the Missouri rates might

not be measured by resorting to the average experience in Illinois during a preceding five years, except for the differences in the law; (Missouri has a valued policy law and Illinois has none) and the physical differences in the property insured in the two states would be difficult, if not impossible, to ascertain accurately. Therefore, the measure adopted, namely, the measure of the experience of all companies in Missouri justly reflects the variations from the National average to the extent that local conditions differ from those nationwide.

The Court say that it cannot reasonably be held that the rates violate the Fourteenth Amendment, because the aggregate collections "are not sufficient to yield a reasonable profit or just compensation to *all* companies that happen to be engaged in the affected business."

The intent of this statute is not to give a profit to *all* companies but only to give an average profit, which means that some companies will make a large profit, some will make a moderate profit, some will suffer moderate losses and some will suffer great losses. As they are, nevertheless, all measured by the average experience of the past, it is not an unjust presumption that upon *the average* they will have that experience for the future, and it not being possible for any of them to accumulate an individual experience which can ever measure profit, they may reasonably abide by an average profit. They are content to do so if by the term profit is meant a profit in fact.

The Court in its opinion say that the complainant did not allege any facts to show that "the reduced rates were confiscatory as to any company." We think we have made it clear that our contention is and has been since the beginning of the case, that the effect of the order is confiscatory as to every one of the complainants and is confiscatory as to each of them in compelling it to write insurance at less than the fair cost of the business.

The Court repeatedly says that the petitioners are competitors. The Court overlooks the fact that insurance companies are owned one by the other. In general, they are operated in fleets, some half dozen companies all being under a common management. No large policy is ever written in the state except a part of it is reinsured in some other company doing business in the state. No property of any substantial value is ever insured but that a number of insurers participate in it. They all make identical rates through a common agency, which agency is provided for by the state. To such bureau they are required to belong and from it they cannot exclude others engaged in the business. This situation does not carry the thought of competition as that idea exists with respect to railroads and ultilities which ordinarily are monopolies in a limited territory. We never yet heard of a passenger being carried over a specified distance by five different carriers who simultaneously carry him from point A to point B. Insurance carriers do that in most of their transactions.

The Court at a number of points in its opinion speaks of the provisions of this statute as "aggregate profit sufficient to constitute just compensation for *all* the companies." We have pointed out herein that the statute neither contemplates nor provides for compensation to all companies but all that is in contemplation of either is just compensation to each company by providing a fair margin of profit upon the same ratio which the average company has had during an elapsed period.

This Court, in its opinion, says that the power of the superintendent of Missouri is different from the power and authority of the superintendent of insurance under the Kansas statute as upheld in *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389. The Courts of Kansas have just construed the Kansas statute and have construed it to require aggregate consideration exactly as was done in the instant case and

providing for attack upon it by all companies, on the ground that each is injured by the ruling, if unsound, exactly as was held in the instant case. The Kansas case will come before this Court on certiorari within the next thirty days and we respectfully suggest that the statement of the Court as to differences between the statutes has no sound basis. Each contemplates a determination of rates of particular companies by consideration of the average experience of all companies in the state during a test period and each prescribes common rates of every insurance company in the state pursuant to such rate order. The right of individual companies to set up unconstitutionality of the rate order which operates to reduce its rates to a confiscatory degree if it were brought by an individual company would necessarily rest upon proof of the average experience of all the companies in the state during a precedent period. If *each* company instituted a separate suit, setting up that *its* property was confiscated *because the average experience* of all companies in the state for a prior period disclosed a confiscatory rate level which would deprive it of property in the future, by compelling it to do business at a loss, there would be presented nothing, in its essence, different from what appears here.

We respectfully urge upon the Court to grant a reargument and a rehearing of this case and upon the coming in of the record in the Kansas case, (wherein appears evidence of economists who gave the Court the benefit of their opinions), if the Court be so advised to hear the cases together.

It is true, that the opinions they expressed do no more than place the seal of approval upon the method of fixing future rates, namely, by consideration of average profits for a past period of a group of companies which, in Missouri, is done by statute; but if Kansas can approve such a method of regulation, without the express direction of a statute, as a sound method of regulating and fixing the rates of each

insurance company, then certainly the legislature of Missouri must have power to do the same thing. To say that each company may set up its individual past experience as putting it in a class different from the remaining companies in the state and thereby produce a variety of rates in the state is to relegate the insurance to a complete chaos and to set back the scientific measurement of hazard which the great skill of engineers and economists have built up as a sound method of dealing between the insurance companies and the states. We do not ask that the existing method of dealing be overturned but only that arbitrary methods of measurement of profit be condemned, as this Court has repeatedly declared it would do in other cases where confiscation was claimed.

The Court will find, following page 1934 of the transcript (Plaintiff's Exhibit 1361), the combined ratio of losses and expenses paid to premiums written for each of the five years, and for the five years, averaged as to all companies, it will be found that the experience for the several five years range from 81.7 per cent to 116.8 per cent, productive of an average of 96 per cent upon the written basis. Taking five years' experiences one after the other, they would not vary nearly so much one from the other as these individual years vary one from the other.

To find how much wider range there is by taking the experience of the several companies even for five years, the Court will note that the experience of the individual companies have variations so terrific that they can form a basis for no conclusion for the future. The Court will find fluctuations as extreme as the following: (See Plaintiff's Exhibit 1363, following Trans. 1938.) The Court will, on that sheet, find the combined ratio of losses and expenses of individual companies running from 51.5 per cent to 185.3 per cent. Even these do not express the extreme. In Exhibit 1363, the Court will find a company which, during that year, had a combined ratio of losses and expenses of 263.5, while an

other company whose experience appears on the same exhibit had an experience of combined losses and expenses of 55.3. In Plaintiff's Exhibit 1364, the Court will find combined losses and expenses in case of one company 379.5; another company 366.5. It can readily be appreciated that the company which suffered such disasters that its losses and expenses were over 300 per cent could not possibly collect rates on the basis of duplication of its experience and yet it might be the best managed company in the state. It is equally clear that a company which had a combined loss and expense ratio of 55 per cent on its business in a notoriously unprofitable state was simply a child of fortune which, rather than to have its rates reduced and revised and fixed on the basis of its past experience, would be much better advised to quit business in Missouri. In other words, no company could possibly do business in Missouri if its rates were to be fixed upon its own experience in that state. No one has ever tried to do business on such a basis. It is completely impossible to so transact it.

We believe this Court has failed to give due effect to the nature of the business before it which differs in its essentials completely from other cases involving rates which have had the consideration of this Court heretofore.

We respectfully ask for a rehearing and reargument.

CHARLES E. HUGHES,
ROBERT J. FOLONIE,
WILLIAM S. HOGSETT,
JOHN S. LEAHY,
ASHLEY COCKRILL,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL.

The undersigned, counsel for the petitioner in the foregoing cause, certify that the above and foregoing petition for rehearing is presented in good faith and not for delay.

Charles E. Hughes,

Robert J. Folonie,

William D. Hoyett,

John D. Seahy,

Ashley Cockrill,

Counsel for Petitioner

by Robert J. Folonie

11 U.S.

Mem on Pet for Rehearing:

I

A: Cert Granted. [Has of no moment]

II

B. Hyde ~~Contended~~ asserted only one ground of Objection - "No Confiscation. No property in MO - Enormous returns"

[This is not quite accurate - See IX and X. P 16 Resp Brf. ~~Pf~~ 11/19/27 - Assert IX - No fed qu - Dec'n rest on other grounds - No fed qu considered. No property - no confis. p 77 X = Aside from construction of Mo Statute, all other matters were questions of fact - all legal questions rested on non fed grounds]

III

C = Not dismissed on ground not asserted by any party - [In qualified sense, this is true. But the stipulations referred to in the Opinion has some bearing = Hyde agreed to make certain findings on references of the Companies. viz: What is a reasonable profit? What pl. for conflagration hazard? What is basis for finding earnings? Ratio Exp. incurred to premiums earned: Ratio losses incurred to prms earned. R 25 r 26

Abolition - to counsel Not
9/6283] ~~not~~ The Co was hamstrung questions to constitutionality
as to court gr and Hyde, Not
having made the findings, - plaintiff
did not dare to bring the case under attack

IIII.

D: But dismissed on points not
raised or decided, Company
should have opportunity to argue
it. =

This is discussed at pages
5 to 27.

V

E. Suit similar to present action
about to be prosecuted. May
well be argued in connection
with Kansas. [But they do
not cite the case. We cant locate
it. -

Second

Petition Relevant paragraphs.

1 as 6283 "ex rel"

2. Ill Am' - Compensation &c

3. No determination as to any to

4. No power under Sup 44 + 5 -

See p. 16 =

Ref is made to allegation — a good one.

Re Assert "Reasonable approximate proof" =. (a) huge profit to some (b) Moderate profit to others (c) moderate losses to still others (d) huge losses to others -

[No authority or reason support this position]

See Opinion Cook paragraph -

The theory now put forward was not argued in last Ct Hse - No allegations concerning this point -